

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Charter Communication's, Inc.'s)	
Request for Waiver of Section 76.1204(a)(1))	CSR-8740-Z
of the Commission's Rules)	
)	MB Docket No. 12-328
Implementation of Section 304 of the)	
Telecommunications Act of 1996)	CS Docket No. 97-80
)	
Commercial Availability of)	
Navigation Devices)	
)	

TIVO INC. REPLY TO OPPOSITION

TiVo Inc. ("TiVo") hereby files this Reply to the Opposition of Charter Communications, Inc. ("Charter") filed in this proceeding on June 3, 2013 ("*Charter Opposition*")¹ in response to the Petition for Reconsideration filed by TiVo.² TiVo had requested that the Media Bureau ("Bureau") reconsider the broad relief granted to Charter in the *Memorandum Opinion and Order* ("*Waiver Order*") in this proceeding that, among other things, released Charter from its obligations under Sections 76.1204(a)(1) and 76.1205(b) to provide CableCARDs to consumers once it certifies that a third party retail device using Charter's downloadable security is available for purchase at retail.³ Charter's response highlights the need for the Bureau to reconsider the scope of the waiver granted to Charter to provide clarity to Charter, other cable operators, equipment manufacturers, and consumers regarding consumers' continued ability to purchase

¹ Opposition of Charter Communications, Inc. to Petition for Reconsideration, MB Docket No. 12-328, CSR-8470-Z (June 3, 2013) ("*Charter Opposition*").

² TiVo Inc., Petition for Reconsideration, MB Docket No. 12-328, CS Docket No. 97-80, CSR-8740-Z (May 20, 2013) ("*TiVo Petition*").

³ *Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, MB Docket No. 12-328, CSR-8740-Z, *Memorandum Opinion and Order*, DA 13-788 (Apr. 18, 2013) ("*Waiver Order*").

competitive navigation devices at retail as envisioned by Congress when it directed the Commission to implement Section 629 of the Communications Act.

In its Petition for Reconsideration, TiVo made it clear that it does not oppose a limited, two-year waiver of the integration ban based on Charter's unique circumstances, but continues to oppose those portions of the relief granted to Charter that go beyond what was requested by Charter and commented upon by parties following the Public Notice in this proceeding. TiVo requested that the Bureau reconsider its *Waiver Order* and: (1) require Charter to continue to supply and support CableCARDS to subscribers wishing to use new retail devices, (2) clarify that the Bureau has made no findings regarding whether Charter's planned system or any other "downloadable" system complies with the integration ban; and (3) clarify that no security system is or will be compliant with the Commission's rules unless the details of the complete system have been presented to the Commission in a proceeding with adequate notice and full opportunity for the public to comment. TiVo reiterates its request, and responds below to Charter's arguments relating to these requests.

I. THE DC CIRCUIT'S DECISION IN *ECHOSTAR* DOES NOT ELIMINATE CABLE OPERATORS' CABLECARD OBLIGATIONS

Charter argues that the *Waiver Order* "strengthens CableCARD support through conditions placed on Charter, rather than weakening the legal requirements for support."⁴ According to Charter, the D.C. Circuit's decision in *EchoStar*⁵ eliminates completely its obligations, absent the conditions imposed in the *Waiver Order*, to provide CableCARDS to consumers using retail devices. Charter itself seems uncertain of the legal effect of *EchoStar*,⁶

⁴ Charter Opposition at 2.

⁵ *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013).

⁶ Charter Opposition at 3 (claiming that, post-*EchoStar*, "the requirements of § 76.1205(b) no longer clearly applied to Charter.") (emphasis added).

and the *Waiver Order* too is far from clear regarding the continued effect of the CableCARD rules post-*EchoStar*.⁷ However, as explained below, while *EchoStar* effectively vacated portions of the CableCARD rules, it did not simply eliminate cable operators' CableCARD obligations altogether, including the obligation to supply CableCARDs to consumers who utilize competitive devices.

Under the *First Report and Order*, which remains unaffected by *EchoStar*, cable operators were required to support retail navigation devices by providing consumers with standard interface, separable security modules.⁸ (As noted in the *Waiver Order*, the integration band was also adopted in the *First Report and Order* and remains unaffected by *EchoStar*.⁹) These modules were initially referred to as "Point of Deployment" modules or PODs, and were later referred to by CableLabs as CableCARDs.¹⁰ In the *Second Report and Order*, the Commission adopted particular technical standards and related regulations following an agreement between the consumer electronics and cable industries, including specific technical

⁷ Compare *Waiver Order* at 6, ¶ 9 ("We recognize that, in vacating the *Second Report and Order*, the *EchoStar* decision eliminated the requirement that cable operators continue to support CableCARD as a means of complying with the integration ban.") with *Waiver Order* at 3, ¶ 4 n.18 (declining to address the continued effectiveness of rules adopted in the *Third Report and Order*, which included the substantive requirements set forth in Section 76.1205(b)).

⁸ *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775, 14792-14809 (1998) ("*First Report and Order*") ; see also *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Second Report and Order, 18 FCC Rcd 20885, 20894, ¶ 19 (2003) ("*Second Report and Order*") (noting that the Commission's existing rules "require[] cable operators to provide PODs to subscribers at their request for use with non-integrated navigation devices.").

⁹ *Waiver Order* at 3, ¶ 4.

¹⁰ "The early cable removable security cards were called Point-of-Deployment (POD) modules. CableLabs later coined the term CableCARD™ These are two names for the same thing." CableLabs, OpenCable CableCARD, http://www.cablelabs.com/opencable/primer/cablecard_primer.html; *Second Report and Order*, 18 FCC Rcd at 20894, ¶ 19 n.45 ("According to NCTA, PODs will now be referred to as CableCARDs for marketing purposes.").

standards relating to CableCARDs that were adopted in Section 76.640. It is these technical rules that were called into question in *EchoStar*, in which the D.C. Circuit did not address the CableCARD requirements but, after vacating the encoding rules, summarily found that the encoding rules could not be severed from the rest of the *Second Report and Order*. The *EchoStar* court therefore vacated the *Second Report and Order* in its entirety — even though the CableCARD provisions are clearly authorized by Section 629 of the Communications Act and help implement the integration ban that the D.C. Circuit has upheld on several occasions.¹¹ Finally, less than three years ago, the Commission further strengthened its CableCARD rules in the *Third Report and Order*,¹² adopting several measures codified in Section 76.1205(b) that require cable operators to supply multi-stream CableCARDs, permit self-installation of CableCARDs, charge uniform CableCARD fees, etc.

Charter argues that because the preamble of Section 76.1205(b) refers to Section 76.640 as a means to classify the MVPDs subject to the rules therein, and because Section 76.640 includes the specific CableCARD technical standard since vacated by *EchoStar*, all of the provisions enacted in the *Third Report and Order* that reinforced the Commission's CableCARD rules are invalid. This is incorrect as a legal matter, disastrous as a policy matter,¹³ and

¹¹ *Waiver Order* at 2 n.9 (citing *Comcast v. FCC*, 526 F.3d 763 (D.C. Cir. 2008); *Charter Comm. V. FCC*, 460 F.3d 31 (D.C. Cir. 2006); *General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000)) .

¹² *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Third Report and Order, FCC 10-181 (re. Oct. 14, 2010)..

¹³ There is simply too much reliance on CableCARDs by consumers and equipment manufacturers for the rules to be considered vacated absent a clear statement by the court. In addition to products being developed and sold by TiVo, other equipment manufacturers are developing and bringing to market products that rely on CableCARDs. See Mari Silbey, *Samsung Embraces CableCARDs*, Light Reading, May 28, 2013, <http://www.lightreading.com/dvrs/samsung-embraces-cablecards/240155638>; Mari Silbey, *Ceton Boosts CableCARDS*, Light Reading, May 14, 2013, <http://www.lightreading.com/content-protection/ceton-boosts-cablecards/240154837>

highlights the need for the Bureau to reconsider and/or clarify any statements in the *Waiver Order* that imply that all of the Commission's CableCARD requirements are no longer in effect.

Duly enacted regulations are presumed to be valid, and court decisions should not simply be presumed to invalidate agency decisions and rules unless the court says so explicitly.¹⁴ In *EchoStar*, the D.C. Circuit vacated the *Second Report and Order* based on, in its view, the Commission's lack of authority to enact encoding rules that applied to direct broadcast satellite ("DBS") providers since such providers were not part of the agreement between the cable and consumer electronics industries. Not surprisingly since the Court did not address the CableCARD rules specifically, the *EchoStar* court said nothing about the separable security modules required by the *First Report and Order* and the numerous provisions adopted by the *Third Report and Order*. A summary statement regarding the encoding rules before the court not being severable from the rest of the *Second Report and Order* is hardly sufficient to nullify the requirements of the *First Report and Order* and the *Third Report and Order*, neither of which were considered by the *EchoStar* court. As the Commission has stated in an analogous circumstance in which it analyzed the effects of a court decision invalidating portions of the Commission's CPNI rules:

[W]e find no compelling evidence to convince us that the court intended to 'take the unusual step of vacating portions of the order and rules not before it' without so stating explicitly, despite the fact that the court's mandate is worded quite broadly.¹⁵

¹⁴ See, e.g., *Nebraska Trails Council v. Surface Transp. Bd.*, 120 F.3d 901, 905 (8th Cir. 1997) (noting narrow scope of review of agency rules); *Rockville Reminder, Inc. v. U.S. Postal Serv.*, 480 F.2d 4, 8 (2nd Cir. 1973) (noting that agency regulations are presumptively valid).

¹⁵ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended; 2000 Biennial Regulatory Review -- Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, 17 FCC Rcd 14860, 14895, ¶ 81 (2002).

There, even though the 10th Circuit stated that it was vacating “the FCC’s CPNI Order and the regulations adopted therein,”¹⁶ the Commission concluded that the court’s decision vacated only those provisions that the court actually considered. Here, though the *EchoStar* court may have vacated the *Second Report and Order*, requirements that stem from other Orders should not be presumed invalid without any reference by the *EchoStar* court to such rules.

Indeed, the specifics of Section 76.1205(b), cited by Charter, illustrate how unconnected that rule is to the court’s decision in *EchoStar*. As Charter notes, the Commission amended Section 76.1205(b) in an *Order on Reconsideration* to add a reference to Section 76.640 for definitional purposes in order to make clear that Section 76.1205(b) applied to cable operators only and not to other MVPDs such as DBS providers. As the Commission stated:

We have concluded that the rule that we adopted could be interpreted to extend to MVPDs that are not subject to our CableCARD rules and navigation devices that do not rely on CableCARDS. This was not our intent. Accordingly, we amend the rule to clarify that *cable operators* that are subject to our CableCARD support rules are required to provide CableCARD-reliant navigation devices with satisfactory access to switched digital programming.¹⁷

The Commission adopted this rule change *sua sponte* with no public notice or comment to make what it clearly viewed as a minor, non-substantive change to clarify the rules. To argue that this rule change, so minor as to be made *sua sponte* without notice or comment, renders Section 76.1205(b) inoperative post-*EchoStar* is to render meaningless the general legal rule that regulations are presumed valid absent explicit mention or discussion by a reviewing court.

To be sure, *EchoStar* has created some confusion regarding the Commission’s CableCARD rules by finding the encoding rules to be non-severable from the rest of the *Second Report and Order* and vacating the *Second Report and Order* in its entirety. To address this

¹⁶ *Id.* n.179.

¹⁷ *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, Order on Reconsideration, FCC 11-7, at 2, ¶3 (rel. Jan. 26, 2011) (citations omitted) (emphasis added).

confusion, the Commission should consider initiating a proceeding to remove such uncertainty and reinstate the rules that the Commission clearly has the authority to enact. Regardless of the need for clarifying and/or reinstating the scope of the CableCARD rules, however, the correct interpretation of *EchoStar* cannot be the nullification of rules adopted in other Commission Orders not even considered — let alone explicitly vacated — by the *EchoStar* court.

TiVo appreciates that the *Waiver Order* requires Charter to comply with all of the substantive CableCARD regulations for the time being, and that any subsequent CableCARD rules adopted and/or reinstated by the Commission will apply to Charter and supersede the conditions of the *Waiver Order* that release Charter from its CableCARD obligations once its downloadable security solution is available on at least one retail device. Nevertheless, the Bureau must clarify that its requirements under the *First Report and Order* and *Third Report and Order* remain in effect post-*EchoStar*.

II. THE BUREAU SHOULD CLARIFY ITS STATEMENTS REGARDING DOWNLOADABLE SECURITY THAT GO BEYOND THE SCOPE OF THE WAIVER ORDER

Charter argues that no clarification is needed regarding whether its downloadable security complies with the integration ban, and that the Bureau cannot announce a new rule requiring “pre-approval of new MVPD security systems.”¹⁸ With respect to Charter’s first argument, TiVo appreciates that the *Waiver Order* made clear that “the Waiver Request is not a request for approval of Charter’s downloadable system.”¹⁹ As TiVo has made clear, TiVo did not and does not oppose the limited, two-year waiver requested by Charter or object to the use of any particular downloadable security in conjunction with the limited waiver. What TiVo objects to are statements by the Bureau that appear to prejudge the acceptability of certain downloadable

¹⁸ Charter Opposition at 5-7.

¹⁹ *Waiver Order* at 10, ¶ 12.

security systems under Section 76.1204(a)(1) and/or appear to bless prior passing statements regarding the acceptability of certain downloadable security systems. Any such findings are beyond the scope of this waiver and should be considered by the Commission with an opportunity for public comment.

In the *Waiver Order*, the Bureau noted that it agreed “that Charter’s downloadable security is not the same system envisioned by the Commission when it made its statements about downloadable security in the *2005 Deferral Order*.”²⁰ Nevertheless, the Bureau referred to a 2007 Press Release stating that it had found that the BBT system that purportedly has some similar characteristics to the system Charter plans to use was “compliant” under the Commission’s rules. As TiVo explained in its Petition for Reconsideration, the only statements that have been made in support of this finding regarding the BBT system have been in a press release outside of any regulatory context and as passing observations in two waiver denials.²¹ These statements were not the basis for action in those proceedings and were never subject to public notice and comment, and are at odds with the Commission’s actions in the *Third Report and Order* which strengthened the Commission’s CableCARD requirements and did not explore alternative means, such as downloadable security, for complying with the integration ban. Particularly given that — as the Bureau acknowledged in the *Waiver Order* — Charter’s proposed downloadable security system is not what was envisioned in the *2005 Deferral Order*, any decision to approve downloadable security systems that were not those envisioned by the full

²⁰ *Id.* n.81.

²¹ TiVo Petition at 18.

Commission should be made by the full Commission following public notice and comment rather than by the Bureau making policy via press releases and passing statements.²²

With respect to Charter's argument that the Bureau should not announce a new rule requiring pre-approval of MVPD security systems, this issue arises precisely because the *Waiver Order* makes statements regarding downloadable security that go beyond the scope of the waiver sought by Charter. Charter's arguments about the need for MVPDs to "act quickly and decisively to safeguard the security and content of their systems" appear to ignore completely the purpose of the Commission's rules implementing Section 629 and the need for retail navigation devices to be able to use the same security systems used by MVPDs subject to the rules. The history of the Commission's proceedings implementing Section 629 are replete with discussion of the importance of common national standards that can help assure a competitive retail market for navigation devices as required by Section 629.²³ The approval of any MVPD security system that is not based on a common national standard necessarily has broad policy implications and raises questions regarding whether the solution complies with the integration ban and fulfills the goals of Section 629.

TiVo and others have discussed on the record the importance of CableCARD as well as the viability and desired characteristics of any successor conditional access solution, whether

²² TiVo notes that when the Commission first considered the possibility of allowing cable operators to deploy downloadable security as a means to comply with the integration ban in the 2005 Deferral Order, it required that the cable industry submit a report on its efforts to develop downloadable security, and provided for public comment on the cable industry report. *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6810-11, ¶ 32 (2005).

²³ See, e.g., *First Report and Order*, 13 FCC Rcd 14804, ¶ 70 ("What is important is for the [POD] supplied by the service provider to be designed to connect to and function with other navigation devices through the use of a *commonly* used interface or through an interface that conforms to appropriate technical standards promulgated by a *national* standards organization.") (emphasis added); *id.* at 14793, ¶49 (discussing the importance of a conditional access security solution that permits portability of equipment). .

downloadable security or some other system.²⁴ TiVo is under no illusion that there is widespread consensus as to these topics, but this simply supports the argument that decisions regarding the acceptability of specific security systems should be made in a proceeding subject to public comment by consumers and manufacturers that will actually utilize the security system in question. TiVo does not seek “new rules” in this proceeding, but simply requests the Bureau to disclaim any statements beyond the scope of the waiver sought by Charter regarding the acceptability of specific security solutions without more detailed guidance from the full Commission following public notice and comment.

* * *

For the reasons discussed above and in its Petition for Reconsideration, TiVo respectfully requests the Bureau to reconsider and/or clarify the *Waiver Order* as discussed herein.

Respectfully submitted,

/s/

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²⁴See, e.g., *National Cable & Telecommunications Association’s Request for Waiver of 47 § 76.1204(a)(1)*, CS Docket No. 97-80, CSR-7056-Z, Opposition of TiVo Inc. at 9-11 (discussing desired characteristics of possible downloadable security solution); Comments of TiVo Inc., MB Docket No. 10-91 (July 13, 2010) (comments on potential “AllVid” gateway). .

CERTIFICATE OF SERVICE

I do hereby certify that on June 10, 2013, I caused a true and correct copy of the foregoing to be sent via electronic mail to the following:

Paul Glist
Paul Hudson
Counsel for Charter Communications, Inc.
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A handwritten signature in black ink, reading "T. Devendra Kumar", is displayed on a light gray rectangular background. The signature is written in a cursive style with a horizontal line underlining the last name.

Devendra T. Kumar
Goldberg, Godles, Wiener & Wright